Supreme Court, U.S.
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No. 87-946

In The

Supreme Court of the United States

October Term, 1987

City of Palo Alto, City of Palo Alto Utilities, and City of Atherton,

Appellants,

vs.

Century Federal, Inc. and United States of America,

Appellees.

On Appeal from the United States District Court for the Northern District of California

MOTION TO DISMISS

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QUESTIONS PRESENTED

The constitutional questions presented, assuming this Court has jurisdiction, are:

1. Can appellant governmental agencies, consistent with the First Amendment to the Constitution of the United States, limit access to the public utility facilities and public property essential to speak and publish by means of cable television to the single cable television operator they deem "best" when those essential facilities and property are physically capable of accommodating more than one cable television system?

2. Can appellant governmental agencies, consistent with the First and Fourteenth Amendments to the Constitution of the United States, condition appellee Century Federal, Inc.'s[1] right to speak and publish within their respective jurisdictions on Century Federal's providing (a) a cable system designed and upgraded to the specifications of appellants, (b) service to every resident, and (c) leased access to commercial entities and free and funded access to public, educational and governmental entities to its system, all without regard to Century Federal's best editorial and business judgments?

This appeal also presents the following questions regarding this Court's jurisdiction:

3. Did the United States District Court "hold" an Act of Congress unconstitutional within the meaning of

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[1]The statement in compliance with Rule 28.1 is set forth in the Appendix ("App.") at 1a-2a.

28 U.S.C. § 1252 despite the fact it expressly stated it was not passing on the constitutionality of any provision of the Cable Communications Policy Act of 1984, 47 U.S.C. § 521 *et seq.*?

4. Is the United States of America a "party" to this action within the meaning of 28 U.S.C. § 1252, despite its response to the District Court's notice pursuant to 28 U.S.C. § 2403(a), in which it declined to address the constitutionality of any provision of the Cable Act in view of its conclusion that no such issue was presented in the action?

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MOTION TO DISMISS

Appellee Century Federal, Inc. ("Century Federal") believes that this case presents an excellent record for the resolution by this Court of the questions presented. It understands that it is its duty, however, to call to the Court's attention what it believes to be serious questions regarding the Court's jurisdiction under 28 U.S.C. § 1252. Century Federal therefore respectfully moves to dismiss the appeal taken from the interlocutory order of the United States District Court for the Northern District of California, dated September 1, 1987. Century Federal believes that appellate jurisdiction is lacking because the District Court did not invalidate any provision of the Cable Communications Policy Act of 1984 ("Cable Act"), 47 U.S.C. § 521 et seq., and the United States is not a party to the action, which are independent conditions for a direct appeal to this Court under § 1252.

OPINIONS BELOW

The District Court's September 1 opinion is not yet reported. It appears at pages 1a-15a of the Appendix ("JS App.") to the Jurisdictional Statement ("JS"). The District Court's two earlier opinions in this action are reported at 579 F.Supp. 1553 ("*Palo Alto I*," dismissing Century Federal's antitrust claims but denying dismissal of its free speech claims), and 648 F.Supp. 1465 ("*Palo Alto II*," granting Century Federal partial summary judgment regarding appellants' monopoly franchising system). See JS App. 47a-74a and 16a-46a, respectively.

JURISDICTION

Century Federal believes that appellants erroneously invoke this Court's jurisdiction under 28 U.S.C. § 1252. The District Court did not pass on the constitutionality of any provision of the Cable Act and the United States does not appear to be a party to this action.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The First Amendment to the Constitution of the United States provides, in relevant part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

2. Section 1 of the Fourteenth Amendment to the Constitution of the United States provides, in relevant part:

> . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The relevant provisions of appellants' municipal ordinance invalidated by the District Court's interlocutory order dated September 1, appear at JS App. 131a-150a.

Century Federal believes that the constitutionality of various provisions of §§ 611, 612, 621 and 624 of the Cable Act, 47 U.S.C. §§ 531, 532, 541 and 544, set forth in JS 2-4, are not involved. The District Court expressly declined

to consider the constitutionality of those provisions. JS App. 2a n. 1.

STATEMENT OF THE CASE

Century Federal was organized for the purpose of providing news, information and entertainment to the residents of appellants' respective jurisdictions. On September 9, 1983, it filed a complaint against appellants stating free speech claims, among others.[2] The complaint sought the right to build and operate a cable television system for the purpose of providing news, information and entertainment without having to participate in a Request for Proposals ("RFP") process designed by appellants to select the single applicant deemed by them to be "best" and which, therefore, contemplated the auctioning off of the right to speak and to publish to the "highest" bidder—the one willing to offer appellants the greatest controls, benefits and concessions.[3] Indeed, appellants have can-

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[2]The complaint was essentially identical to the complaint filed in *City of Los Angeles v. Preferred Communications*, 476 U.S. 488 (1986) (*"Preferred II"*).

[3]Appellants' RFP contemplated a two-step procedure whereby aspiring speakers and publishers were required to submit bids meeting appellants' minimum demands, *including those invalidated by the District Court below*, followed by appellants' negotiation with one or more bidders, selected as the most "qualified," to formalize a franchise (that is, contractual) agreement designed to grant appellants greater control and rights with respect to their chosen cable monopolist than they could otherwise exercise under their police powers. Specifically, the chosen monopolist was required to waive any rights created by law contrary to or inconsistent with the franchise agreement. For brief, but fuller descriptions, see *Palo Alto I*, 579 F.Supp. at 1554-55 and n. 3; JS App. 48a-50a and n. 3; and *Palo Alto II*, 648 F.Supp. at 1467-68; JS App. 17a-19a.

didly admitted that they desired to restrict access to a single cable television operator in order to exercise "the leverage necessary to obtain . . . concessions from . . . [the] cable operator." Otherwise, the "operator will have no reason to provide public access, leased channels, and the like if . . . [appellants] cannot exact those concessions as the price of admission." See Exhibit B to Supplemental Declaration of Leonard Tow, filed June 16, 1986 ("Tow Supp. Decl.").

Despite the filing of Century Federal's complaint, the District Court's denial of their motion to dismiss Century Federal's constitutional claims in *Palo Alto I*, and the Ninth Circuit's decision in *Preferred Communications v. City of Los Angeles*, 754 F.2d 1396 (9th Cir. 1985), *affirmed*, 476 U.S. 488 (1986) (*"Preferred I"*), appellants proceeded with dispatch to implement their monopoly RFP process. See Exhibit A to Tow Supp. Decl. A one-page ordinance was enacted November 18, 1985, which formally granted a license to Cable Communications Cooperative of Palo Alto, Inc. ("Cable Coop"). See Exhibit 6 to Memorandum in Support of Plaintiff's [Century Federal's] Motion for Partial Summary Judgment, filed June 16, 1986 ("June 16 Memo."). Thereafter, on March 24, 1986, appellants executed a 75-page, single-spaced "Franchise Agreement," together with more than 150 pages of appendices, the bulk of which are also single-spaced, with Cable Coop. See Exhibit A to the Declaration of Jeanne Moulton, dated July 17, 1986.[4]

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[4]In Appendix K, it may be noted, appellant Palo Alto reserves the option of purchasing a 49-percent interest in Cable Coop's system.

The Franchise Agreement prescribes the programming to be supplied by Cable Coop. See *id.*, Exhibits C and D to the Franchise Agreement.[5] Although the Agreement purports to grant Cable Coop a "franchise" to construct, maintain and operate a cable television system on, over, under and along appellants' streets and rights-of-way, the Agreement actually is only a license to operate a cable television business. Pacific Bell, the local telephone utility, agreed to construct, operate and maintain a cable system, pursuant to a tariff offering approved by the Federal Communications Commission under 47 U.S.C. § 214, in compliance with appellant's demands, utilizing *Pacific Bell*'s own easements and rights-of-way over public and private property. By virtue of the state statute, California Public Utilities Code § 7901,[6] Pacific Bell is granted the use of all public rights-of-way for the conduct of its public utility communication functions. This includes both interstate and intrastate functions. Only the studios, headend, and customer devices, all located on private property, are under

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[5]In addition, appellants established a Community Access Organization, consisting solely of appointees of appellants who serve at their pleasure, the purpose and function of which organization is to administer the access channels mandated by the Franchise Agreement with Cable Coop, and to exercise control over the content and nature of all access programming. See Declaration of Anne M. Ronan, filed June 16, 1986.

[6]This section provides:

> Telegraph or telephone corporations may construct lines of the telegraph or telephone lines along and upon any public road or highway, along or across any of the waters or lands within this State, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters.

the control of the "franchisee," Cable Coop. See Agreement for the Provision of Broadband Cable Distribution Facilities between Pacific Bell and Cable Communications Cooperative of Palo Alto, Inc., Exhibit 8 to the June 16 Memo.

It is thus clear that appellants' RFP process is nothing more nor less than a licensing-of-the-press device by means of which they exercised the right to determine who could speak and publish by means of cable television. They have attempted to disguise this fact by purporting merely to regulate the right to use their streets and rights-of-way.[7] However, their licensing process in fact has little to do with the use of the streets and public rights-of-way. No local franchise is required of, nor do appellants claim the

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[7]As the Senate Committee on Commerce, Science and Transportation noted with respect to the need for federal legislation which ultimately resulted in the Cable Act:

> As technology expanded and cable systems became capable of offering more services, local municipalities['] interest in, and thus their regulation of, cable began to increase. . . .
>
> * * *
>
> Unlike previous licenses which were based upon the police power, many modern cable franchises touch virtually every aspect of a cable system's operation.
>
> The premise for the exercise of this expanded local jurisdiction over cable systems continues to be its use of local streets and rights of way. In the past, local regulation bore a reasonable relationship to that use. With the introduction of cable into larger markets and the expansion of services provided over cable, the degree and detail of local regulation has increased and there is no longer a reasonable relationship between local regulation and cable systems' use of streets and rights of way.

Sen. Rep. 98-67, 98th Cong., 1st Sess. 6 (1983).

right to demand a license or franchise from, Pacific Bell for the construction and maintenance by Pacific Bell of cable television facilities, although appellants will not allow Cable Coop to speak or publish over those facilities without a "franchise."

Appellants could arrogate to themselves the role of gatekeepers of the marketplace of ideas because Pacific Bell refused to provide Century Federal the essential "pole attachment services"[8] for construction of a cable system pursuant to California Public Utilities Code § 767.5, on the ground that Century Federal had neither a license nor a franchise to conduct a cable television business. Appellants would not issue Century Federal a license to so speak and publish unless it submitted to appellants' RFP licensing process.[9] In short, in the guise of regulating the use of the streets and public rights-of-way within their respective jurisdictions, appellants sought and seek to control *who* may speak and, given their claimed power to deny renewal of that right, also sought and seek effec-

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[8]"Pole attachment services" include not only the use of a public utility's poles and easements, but also its underground conduits, easements and rights-of-way. See Cal. Pub. Util. Code § 767.5(a)(2)-(5); *Salvaty v. Falcon Cable Television*, 165 Cal.App. 3d 798, 212 Cal.Rptr. 31 (1985); *Witteman v. Jack Barry Cable T.V.*, 192 Cal.App.3d 1619, 228 Cal.Rptr. 584 (1986). See also declaration of Frederick Bolte filed October 29, 1987, concerning the issue of franchise fees which is still pending below.

[9]Local governments will not normally allow construction of independent pole plants for cable systems. See H. Rep. No. 721, 95th Cong., 1st Sess. 2 (1977). Thus, there is no alternative means of speaking and publishing by means of cable television except by use of the local public utility facilities. See, e.g., *F.C.C. v. Florida Power Corp.*, 107 S.Ct. 1107, 1109-10 (1987). California Public Utilities Code § 767.5 is reproduced at App. 3a-6a.

tively to control *what* is said as well, particularly with respect to matters of local governmental concern.

After several delays and extended summary judgment proceedings,[10] the District Court, on December 3, 1986, granted Century Federal's motion for partial summary judgment, holding that appellants' monopoly (RFP) franchise system was unconstitutional. 648 F.Supp. 1465; JS App. 16a.[11] In their statement for a status conference held pursuant to the December 3 Order, on February 11, 1987, appellants requested issuance of a preliminary injunction

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[10]The District Court denied appellants' motion to dismiss Century Federal's free speech claims on February 15, 1984. *Palo Alto I*, 579 F.Supp. 1553; JS App. 47a. Appellants then moved for summary judgment, and Century Federal moved for partial summary judgment, with respect to the constitutionality of appellants' monopoly (RFP) franchise system. Without ruling on those motions, however, the District Court on February 29, 1985, dismissed the complaint without prejudice, in the hopes that the then-recent enactment of the Cable Act would resolve the dispute. JS App. 83a; see also *Palo Alto II*, 648 F.Supp. at 1468; JS App. 19a-20a. On March 1, 1985, the Ninth Circuit filed its opinion in *Preferred I*. On March 6, 1985, Century Federal filed this action, realleging its constitutional claims, since appellants continued, despite the enactment of the Cable Act, to refuse it a license to speak and publish. (The parties stipulated that the pleadings and records in the first action were deemed part of the second action, and that the second action was deemed filed on the date the first action was filed.) All proceedings in this action were then stayed by the District Court following this Court's grant of *certiorari* in *Preferred*. Following this Court's decision in *Preferred II*, on June 2, 1986, Century Federal filed its first motion for partial summary judgment in this action.

[11]The District Court expressly noted that the constitutionality of the Cable Act was not "directly challenged" in this action. 648 F.Supp. at 1465 n. 4; JS App. 20a n. 4. Appellants purport to appeal from this order, some ten-months later, after the United States allegedly became a party to the action. JS App. 78a.

against themselves to enable them to "mitigate damages," and specified as "remaining issues" their right to impose various conditions, including those later resolved adversely to them in the District Court's order of September 1, 1987, which they have appealed to this Court.

On March 23, 1987, as requested by appellants, the District Court issued a preliminary injunction compelling them "to issue a license to plaintiff [Century Federal], as defined by 47 U.S.C. section 522(8)" of the Cable Act, "so as to construct and operate a cable system within the entire Service Area covered by the franchise agreement between defendants [appellants] and Cable Coop." JS App. 75a-76a. The injunction provided that Century Federal's right to commence construction could not be delayed "by reason of its having objected to any term or condition of the license, unless otherwise ordered by the Court," but that such right would be subject to appellants' reasonable police power regulations, and that "[w]hen the Court has adjudicated the legality of any other disputed terms and conditions with which plaintiff [Century Federal] has not complied pending further proceedings herein, plaintiff [Century Federal] will be required to comply immediately with those terms and conditions found to be valid in order to continue and complete construction and operation of its system unless the Court orders otherwise." JS App. 76a.

Appellants enacted an ordinance (not a franchise agreement) which, for purposes of this appeal, was virtually identical to the contract earlier executed with Cable Coop pursuant to their monopoly (RFP) franchise system.

See JS 7 n. 5.[12] Appellants assert that in enacting this ordinance they exercised their authority under the Cable Act, and required Century Federal (1) to provide leased access channels, and to donate channels for governmental, public and educational use, over all of which Century Federal must give up editorial control; (2) to construct a cable system throughout appellants' territorial limits; and (3) to provide a system with a 550 Mhz cable, two-way capacity, and an institutional network, all of which must be constantly up-graded, generally referred to as a state-of-the-art system. JS 7-8.[13] In fact, appellants claimed the power to impose these demands before enactment of the Cable Act. See *Palo Alto I*, 579 F.Supp. at 1554 n. 3; JS App. 48a-49a n. 3. The source of their claimed authority is, therefore, *not* dependent on the Cable Act, as is discussed more fully in Point I, B, of the Argument below.

Century Federal objected to all those provisions of the ordinance which it believed were not reasonably re-

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[12]The ordinance even has the same section numbering as the contract executed with Cable Coop. Some provisions, however, which could not be enacted in light of the District Court's injunction or because they seemed unconstitutional even to appellants if enacted as a regulatory ordinance rather than a contract, were deleted. See, e.g., JS App. 137a, 140a. Thus, the provisions applicable to Century Federal were reduced from 75 to 65 single-spaced pages, and the appendices were reduced from in excess of 150 to some 40 pages. See Exhibit 1 to Plaintiff's [Century Federal's] Objections to Various Provisions of Defendants' [Appellants'] Proposed Ordinance Granting a Cable Television Franchise to Plaintiff, filed March 10, 1987.

[13]Appellants concede that their ordinance does not, in fact, expressly specify any particular number of channels. JS 8 n. 6. This fact is significant with respect to their reliance on the Cable Act's requirements for leased access channels. See footnote 20 at page 20, below.

lated to appellants' traditional police power concerns—the bulk of the provisions—and the District Court decided to determine the constitutionality of the challenged provisions in a *series* of motions for partial summary judgment. Thus, the order dated September 1, 1987 is only the first of several contemplated rulings. See JS App. 13a-15a.

Before that ruling, the District Court, at appellants' request, gave notice to the Attorney General of the United States that Century Federal's pending motion for partial summary judgment "draws into question the constitutionality" of the Cable Act, and stated that the "United States may intervene in this action by filing a memorandum . . . addressing the question of the Act's constitutionality." JS App. 110a. In response, the United States filed a memorandum, but declined to address the constitutionality of the Act: "The United States concludes that it is not appropriate to address the constitutionality of the Act in this litigation at this time." JS App. 116a.[14] In its September 1 interlocutory order, the District Court explicitly declined to rule on the constitutionality of any provision of the Cable Act. JS App. 2a n. 1. Appellants nevertheless filed a notice of appeal to this Court from that order on October 1, 1987, under 28 U.S.C. § 1252. JS App. 78a.

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[14]This coincided with Century Federal's position below.

ARGUMENT

Century Federal moves to dismiss this appeal on the ground that the Court lacks jurisdiction under 28 U.S.C. § 1252. That section provides, as relevant:

> Any party may appeal to the Supreme Court from an interlocutory . . . order of any court of the United States . . . holding an Act of Congress unconstitutional in any civil action . . . to which the United States . . . is a party.

The terms of the section are not met because the District Court did not hold any Act of Congress unconstitutional, and the United States is not a party to the action.

I. THE DISTRICT COURT DID NOT HOLD ANY PROVISION OF THE CABLE ACT UNCONSTITUTIONAL

The District Court explicitly stated in the appealed order of September 1, 1987, in apparent agreement with the argument of the United States:

> Because the Cable Act authorizes, but does not mandate, the minimum requirements addressed in this Order, the Court does not herein purport to make any determination on the constitutionality of any particular provisions of the Act.

JS App. 2a n. 1. In its earlier order of December 3, 1986, which held appellants' monopoly franchise system unconstitutional (and which appellants also tender for review by this Court), the District Court also stated, with reference to the provisions of § 621(a)(1) of the Cable Act, 47 U.S.C. § 541(a)(1), authorizing the award of "1 or more" franchises:

> The constitutionality of that Act is not being directly challenged in this litigation, but the Ninth Circuit has called into question the constitutionality of a number of its provisions in strong dicta in the *Preferred I* decision. . . .

Palo Alto II, 648 F.Supp. at 1468 n. 4; JS App. 20a n. 4.[15] Thus, the District Court recognized that there may be constitutional questions about some provisions of the Cable Act, but did not invalidate any provision of the Act in either of the two orders appellants request this Court to review. To the same effect, see *Group W, Inc. v. City of Santa Cruz*, 669 F.Supp. 954, 958 n. 8 (N.D. Cal. 1987).

A. Mere Construction of a Federal Statute Does Not Extend Jurisdiction to This Court under § 1252

Appellants contend that the District Court engaged in semantic games, and in fact held various provisions of the Cable Act unconstitutional. JS 12, citing *Walters v. Na-*

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[15]Appellants seek review of the December 3, 1986 Order on the ground that this Court obtains jurisdiction of the "whole case" when an appeal properly lies under § 1252. JS 27, citing *McLucas v. DeChamplain*, 421 U.S. 21, 31-32 (1975); see also *United States v. Raines*, 362 U.S. 17, 27 n. 7 (1960). The purpose of this practice, however, is to permit this Court to *avoid* passing on the constitutional questions if an alternative basis for resolution of the case is possible and the constitutional questions can thereby be avoided. *United States v. Locke*, 471 U.S. 84, 92 (1985). The District Court in both its orders did simply that: it avoided resolving the constitutionality of the Cable Act. Thus, this Court will face the constitutional issues appellants tender only *if* it were to conclude that the District Court's *construction* of the Cable Act is erroneous. However, an erroneous construction, as shown immediately below, is not a basis for § 1252 jurisdiction.

tional Association of Radiation Survivors, 473 U.S. 305, 317 (1985). It is correct that the lower court need not expressly "hold" an Act of Congress unconstitutional for this Court to obtain § 1252 jurisdiction. See, e.g., *United States v. Clark*, 445 U.S. 23, 25 (1980) (ruling based on prior decision which had held federal Act unconstitutional); *California v. Grace Brethren Church*, 457 U.S. 393, 406 (1982) (state statute held unconstitutional without reference to federal statute which was part of a single statutory scheme; intent clear to declare both statutes unconstitutional); see also *Raines*, 362 U.S. at 20 ("basis of decision below in fact was that the Act of Congress was unconstitutional"). This is true even if the lower court lacked jurisdiction to declare the Act unconstitutional (see, e.g., *McLucas*, 421 U.S. at 31; *Williams v. Zbaraz*, 448 U.S. 358, 367-68 (1980)), or if a federal Act is only held unconstitutional as applied to a particular situation or even as to a single person (*Fleming v. Rhodes*, 331 U.S. 100, 103-04 (1947); *United States v. Darusmont*, 449 U.S. 292, 293 (1981); *United States v. Lee*, 455 U.S. 252, 256 n. 5 (1982); *E.E.O.C. v. Wyoming*, 460 U.S. 226, 229 (1983)).

But appellants cite no case, and Century Federal has found none, which recognizes this Court's jurisdiction under § 1252 when the lower court expressly *refrains* from passing on the constitutionality of the federal legislation involved. It would seem, morever, that when, as here, the lower court construes a federal statute to avoid a constitutional question, there is no § 1252 jurisdiction. *United States v. Christian Echoes National Ministry*, 404 U.S. 561, 564, 566 (1972) (District Court narrowly construed statute to avoid holding it unconstitutional); see also *Balti-*

more & Potomac R. Co. v. Hopkins, 130 U.S. 210, 226 (1889) (under predecessor of 28 U.S.C. § 1257(1)). This is true even if the federal statute is *erroneously* construed. *Cf. Ivanhoe Irrigation District v. McCraken*, 357 U.S. 275, 289-90 (1958) (under 28 U.S.C. § 1257(1)). Appellants may not manufacture § 1252 jurisdiction by their *ipse dixit* that the District Court held the Cable Act unconstitutional whether it thought it did or not. This Court's jurisdiction does not depend on "what the contentions of the parties might be as to what . . . [the] proper basis [of the District Court's order] should have been." *Raines*, 362 U.S. at 20.

Even if this were a case of first impression, the provisions for a direct appeal to this Court are narrowly construed to minimize the mandatory docket of the Court in the interests of sound judicial administration. *Gonzalez v. Automatic Employees Credit Union*, 419 U.S. 90, 98 (1974). This case implicates none of the concerns of Congress previously identified by this Court: (1) a respect for separation of powers; (2) the need for certainty and uniformity when an Act of Congress has been declared unconstitutional; and (3) the potential ramifications beyond the interests of the litigants in the case. *Heckler v. Edwards*, 465 U.S. 870, 881-82 (1984). Given the express declination of the District Court to address the constitutionality of any provision of the Cable Act, the first two concerns are not even facially at stake. The only possible justification for mandatory review at this stage of this case, therefore, is the possible ramifications of the opinion in other cases. But "Congress did not enact an open-ended 'impact' test for determining which cases

should come to this Court for direct review." *Id.* at 884.[16] Since the United States is not concerned with the impact of the September 1 order, this Court should not, even if it were writing on a clean slate, construe § 1252 broadly merely to permit appellants to be heard without first going to the Ninth Circuit. This conclusion is particularly compelling when appellants will have the ultimate right to appeal the invalidation of their ordinance to this Court under 28 U.S.C. § 1254(2). See, e.g., *New Orleans v. Dukes*, 427 U.S. 297, 301 (1976) (municipal ordinance is "State statute" for purposes of § 1254(2)).

B. Appellants' Power To Enact the Invalidated Provisions of Their Ordinance Is Not Founded on the Cable Act

In an attempt to convince this Court that the Cable Act was held unconstitutional, appellants repeatedly assert that they acted pursuant to the provisions of that Act. Brief analysis of the nature of the restrictions on appellants' power to regulate cable television, however, demonstrates the unsoundness of their position.

Appellants exist under and derive their powers from state law. California Government Code § 53066 authorizes them to license and regulate cable television opera-

[16]Compare, in this regard, the impact of this case with that of the order, in *Walters*, relied on by appellants. In *Walters*, the District Court issued a nationwide preliminary injunction barring enforcement of the challenged federal Act. Here, in contrast, the District Court refrained from addressing the constitutionality of the Cable Act, and its order does not affect the United States' interests in the enforcement of that Act at all.

tions.[17] That is why appellants were undertaking to impose the provisions invalidated by the District Court long before enactment of the Cable Act. Before that Act, the only restrictions on their powers were those imposed by the California and United States Constitutions, and by federal law insofar as the Federal Communications Commission preempted local regulation of cable television under the Communications Act of 1934. See, e.g., *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968); *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984).

Appellants' "authority" for the provisions of their ordinance which have been invalidated existed under state law before enactment of the Cable Act. The federal "authority" on which they now seek to rely was unnecessary and superfluous *if* their demands are constitutional. Century Federal sought protection under the California Constitution (see JS App. 104a), as well as the United States Constitution, but the District Court did not pass on those claims (JS App. 2a n. 2). Nor, with respect to the issues resolved by the District Court, are any issues of FCC preemption presented. Thus, the relevant restrictions on appellants' licensing ordinance are found in the United States Constitution, and the enactment of the Cable Act has not changed that fact.[18]

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[17]The provisions of California Government Code § 53066 are reproduced at App. 7a-8a.

[18]Appellants' implicit position is that the Cable Act should be construed to grant local governments plenary authority over cable companies without regard to the requirements of the United

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Enactment of the Cable Act essentially had only two effects: it withdrew some regulatory authority from the FCC and transferred it to local governments, thereby removing some federal constraints,[19] and it imposed federal limits on the power exercised at the local level. Cable Act § 636, 47 U.S.C. § 556. In short, the Cable Act principally created ceilings on local regulation; it mandated very few floors for local regulation. See House Report 19 (Cable Act defines and limits authority local governments may exercise).[20]

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States Constitution, for only then does their position—that the District Court "invalidated" various provisions of the Cable Act by construing it to avoid deciding its constitutionality—make any sense. But surely the Congress is not required to insert in each section of the Act a caveat that the authority granted must be exercised in a constitutional manner.

[19]A ready example is franchise fees. California Government Code § 53066 authorizes a franchise fee of up to 5 percent. The FCC permitted a maximum fee of 5 percent only *if* the costs of regulation exceeded 3 percent, which was otherwise the maximum franchise fee allowed. See H. Rep. No. 98-934, 98th Cong., 2d Sess. 26 (1984) ("House Report"). The Cable Act now permits a maximum fee of 5 percent without regard to the cost of regulation. § 622, 47 U.S.C. § 542.

[20]Appellants nevertheless contend that the District Court impliedly held provisions of §§ 611, 612, 621, and 624 of the Cable Act, 47 U.S.C. §§ 531, 532, 541, and 544, unconstitutional. Those relating to access channels for public, educational and governmental use are expressly permissive. Cable Act § 611, 47 U.S.C. § 531. The same is true with respect to the number of cable licenses to be issued (Cable Act § 621(a), 47 U.S.C. § 541(a)), and regulation of facilities and equipment (Cable Act § 624(b)(A), 47 U.S.C. § 544(b)(A)). Only Cable Act § 612(b)(1), 47 U.S.C. § 532(b)(1), with respect to commercial leased channels, and Cable Act § 621(a)(3), 47 U.S.C. § 541(a)(3), concerning discrimination based on income, are cast in mandatory terms.

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Accordingly, this appeal should be dismissed on the ground that neither of the orders which appellants seek to review has held that any provision of the Cable Act is unconstitutional, either on its face or as applied.

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Leased access channels are mandated, however, only for systems with 36 or more channels. Cable Act § 612(b)(1)(A), 47 U.S.C. § 532(b)(1)(A). Appellants' licensing ordinance nowhere mandates the number of channels to be built. They assert that, in effect, they require 80 channels. JS 8 n. 6. Assuming that is true, it is clear that it is their ordinance, and *not* the Cable Act, which mandates any commercial leased channels. Likewise, Cable Act § 621(a)(3), 47 U.S.C. § 541(a)(3), does not mandate building a system throughout appellants' entire territorial limits. It merely mandates that discrimination not be based on the income of potential subscribers. See *American Civil Liberties Union* v. *F.C.C.*, 823 F.2d 1554, 1579-80 (D.C. Cir. 1987). The effect of *appellants'* franchise and licensing ordinance requirements is to compel poorer areas, with more households per mile, to subsidize the more affluent areas, with fewer households per mile. Moreover, since appellants define the required "service area," which does *not* follow the political boundaries of the governmental entities who are parties to the Joint Powers Agreement, they do not seek to provide all their residents with access to cable service, but only those in the areas which appellants select. Finally, it should be noted that the version of the Act to which the House Report was addressed was subsequently amended to provide that one of the purposes of the Cable Act is to "promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems." Cable Act § 601(6), 47 U.S.C. § 521(6). Compare House Report 2.

II. THE UNITED STATES IS NOT A PARTY TO THIS ACTION

There is no formal order of intervention of the United States.[21] The District Court informed the United States it could intervene by filing a memorandum "addressing the question of the Act's constitutionality." JS App. 110a. Since the United States filed a memorandum, appellants contend that it has intervened. They ignore, however, that the United States declined to address the constitutionality of Act: "The United States concludes that it is not appropriate to address the constitutionality of the Act in this litigation at this time." JS App. 116a.[22] The purpose of § 1252, after all, is to permit the United States to obtain direct review by this Court when it has unsuccessfully defended an Act of Congress.

While the United States will undoubtedly speak for itself on this point, it is Century Federal's understanding that the United States is not a formal party to this action. Thus, this appeal should be dismissed on that ground as well.

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[21]The statement in the District Court's order that "the United States is not required to submit a supplemental brief on the fees" (JS App. 15a) does not purport to be such an order. It is fairly construed to be nothing more than a recognition that the Court accepted the position of the United States and therefore the United States had no further immediate interest in the case.

[22]The fact that the parties have continued to provide the United States with courtesy copies of subsequent proceedings (see, e.g., JS App. 130a) surely may not be construed to make the United States a party. Since the United States indicated that it declined to address the constitutionality of the Cable Act "at this time" (JS App. 116a), it is appropriate to keep the United States advised of the status of the case.

CONCLUSION

Century Federal contended below that the constitutionality of the Cable Act was not directly implicated by either of its partial summary judgment motions attacking appellants' ordinance. However, if this Court concludes that portions of the Cable Act were, in fact, held unconstitutional, as appellants contend, and that the United States in fact became a party to this action by filing the memorandum it did, then Century Federal believes that this case presents a fully developed record not only of the issue left unresolved in *Preferred II* with respect to the constitutionality of monoply (RFP) franchising of cable television, but also of some of the major burdens on the right of cable companies to speak and publish, burdens which have far too often and far too extensively been imposed of late by local franchising authorities, particularly in major metropolitan areas.

Respectfully submitted,

HAROLD R. FARROW
SIEGFRIED HESSE
ROBERT M. BRAMSON

By HAROLD R. FARROW
Counsel of Record

(Appendix follows.)

APPENDIX

RULE 28.1 STATEMENT:

Appellee Century Federal, Inc., is a wholly owned subsidiary of Century Federal Cable Holding Corp. a subsidiary of Century Communications Corp., a Texas corporation, which in turn is a subsidiary of Century Communications Corp., a New Jersey corporation. Century Federal has no subsidiaries and no affiliates other than the subsidiaries and affiliates of Century Communications Corp. of New Jersey. Besides those named above, those subsidiaries and affiliates are:

Century Oregon Cable Corp.
Century II Communications Corp.
Century Cable of Northern California
Century Mendocino Cable Television, Inc.
Century Cable of Southern California
Century S'west Cable Television I, Inc.
Century S'west Cable Television II, Inc.
Century S'west Cable Television III, Inc.
Rentavision of Brunswick, Inc.
Century Carolina Corp.
Century Cable Management Corp.
Century Norwich Corp.
Century Berkshire Cable Corp.
Century Venture Corp.
Century Colorado Corp.
Colorado Springs Cablevision, Inc.
Century New Mexico Cable Television Corp.
Century Trinidad Cable Television Corp.
Century Indiana Corp.
Sentinel Comm. of Muncie, Indiana, Inc.
Huntington CATV, Inc.
Warrick Cablevision, Inc.
Century Warrick Cable Corp.
Century Lykens Cable Corp.
Century Shenango Cable Television Inc.
Century Wyoming Cable Television Corp.

Valley Video Inc.
Century Enterprise Cable Corp.
Century Alabama Corp.
Century Cullman Corp.
Century Mississippi Corp.
Century Ohio Cable Television Corp.
Century Huntington Company
Wilderness Cable Company
Century Mountain Corp.
Century Virginia Corp.
Century Kansas Cable Television Corp.
Owensboro on the Air, Inc.
The Lantern Corporation
Century Microwave Corp.
FAE Cable Management Corporation
Century Southwest Cable Television, Inc.
Century Pacific Cable TV, Inc.
Badger Holding Corp.
S/T Cable Corp.
Paragon Cable Television, Inc.
Paragon Cablevision Management Corp.
Paragon Cablevision Construction Corp.
Franem Cable Company
Century-ML Cable Corporation
Century Washington Cable Television Inc.
Cowlitz Cablevision, Inc.
Century-ML Cable Venture, a partnership

CALIFORNIA PUBLIC UTILITIES CODE § 767.5:

(a) As used in this section:

(1) "Public utility" includes any person, firm, or corporation, except a publicly owned public utility, which owns or controls, or in combination jointly owns or controls, support structures or rights-of-way used or useful, in whole or in part, for wire communication.

(2) "Support structure" includes, but is not limited to, a utility pole, anchor, duct, conduit, manhole, or handhole.

(3) "Pole attachment" means any attachment to surplus space, or use of excess capacity, by a cable television corporation for a wire communication system on or in any support structure located on or in any right-of-way or easement owned, controlled, or used by a public utility.

(4) "Surplus space" means that portion of the usable space on a utility pole which has the necessary clearance from other pole users, as required by the orders and regulations of the commission, to allow its use by a cable television corporation for a pole attachment.

(5) "Excess capacity" means volume or capacity in a duct, conduit, or support structure other than a utility pole or anchor which can be used, pursuant to the orders and regulations of the commission, for a pole attachment.

(6) "Usable space" means the total distance between the top of the utility pole and the lowest possible attachment point that provides the minimum allowable vertical clearance.

(7) "Minimum allowable vertical clearance" means the minimum clearance for communication conductors along

rights-of-way or other areas as specified in the orders and regulations of the commission.

(8) "Rearrangements" means work performed, at the request of a cable television corporation, to, on, or in an existing support structure to create such surplus space or excess capacity as is necessary to make it usable for a pole attachment. When an existing support structure does not contain adequate surplus space or excess capacity and cannot be so rearranged as to create the required surplus space or excess capacity for a pole attachment, "rearrangements" shall include replacement, at the request of a cable television corporation, of the support structure in order to provide adequate surplus space or excess capacity.

(9) "Annual cost of ownership" means the sum of the annual capital costs and annual operation costs of the support structure which shall be the average costs of all similar support structures owned by the public utility. The basis of computation of annual capital costs shall be historical capital costs less depreciation. The accounts upon which the historical capital costs are determined shall include a credit for all reimbursed capital costs of the public utility. Depreciation shall be based upon the average service life of the support structure. As used in this paragraph, "annual cost of ownership" shall not include costs for any property not necessary for a pole attachment.

(b) The Legislature finds and declares that public utilities have dedicated a portion of such support structure to cable television corporations for pole attachments in that public utilities have made available, through a course of conduct covering many years, surplus space and excess capacity on and in their support structures for use by cable

television corporations for pole attachments, and that the provision by such public utilities of surplus space and excess capacity for such pole attachments is a public utility service delivered by public utilities to cable television corporations.

The Legislature further finds and declares that it is in the interests of the people of California for public utilities to continue to make available such surplus space and excess capacity for use by cable television corporations.

(c) Whenever a public utility and a cable television corporation or association of cable television corporations are unable to agree upon the terms, conditions, or annual compensation for pole attachments or the terms, conditions, or costs of rearrangements, the commission shall establish and enforce the rates, terms, and conditions for pole attachments and rearrangements so as to assure a public utility the recovery of both of the following:

(1) A one-time reimbursement for actual costs incurred by the public utility for rearrangements performed at the request of the cable television corporation.

(2) An annual recurring fee computed as follows:

(A) For each pole and supporting anchor actually used by the cable television corporation, for a period of four years following the effective date of this section, the annual fee shall be two dollars and fifty cents ($2.50). Thereafter, the annual fee shall be two dollars and fifty cents ($2.50) or 7.4 percent of the public utility's annual cost of ownership for the pole and supporting anchor, whichever is greater, except that if a public utility applies for establishment of a fee in excess of two dollars and fifty

cents ($2.50) under this section, the annual fee shall be 7.4 percent of the public utility's annual cost of ownership for the pole and supporting anchor.

(B) For support structures used by the cable tele vision corporation, other than poles or anchors, a percentage of the annual cost of ownership for the support structure, computed by dividing the volume or capacity rendered unuseable by the cable television corporation's equipment by the total useable volume or capacity. As used in this paragraph, "total useable volume or capacity" means all volume or capacity in which the public utility's line, plant, or system could legally be located, including the volume or capacity rendered unuseable by the cable television corporation's equipment.

(d) In the event that it becomes necessary for the public utility to use space or capacity on or in a support structure occupied by the cable television corporation's equipment, the cable television corporation shall either (1) pay all costs for rearrangements necessary to maintain the pole attachment or (2) remove its cable television equipment at its own expense.

CALIFORNIA GOVERNMENT CODE § 53066:

Any city or county or city and county in the State of California may, pursuant to such provisions as may be prescribed by its governing body, authorize by franchise or license the construction of a community antenna television system. In connection therewith, the governing body may prescribe such rules and regulations as it deems advisable to protect the individual subscribers to the services of such community antenna television system. The award of the franchise or license may be made on the basis of quality of service, rates to the subscriber, income to the city, county or city and county, experience and financial responsibility of the applicant plus any other consideration that will safeguard the local public interest, rather than a cash auction bid. The maximum franchise fee for any franchise or license hereafter awarded pursuant to this section or pursuant to any ordinance adopted under authority of this section by any city or county or city and county shall be 5 percent of the grantee's gross receipts from its operations within such city or county or city and county. Intrastate telecommunications services subject to taxation under Part 22 (commencing with Section 44000) of Division 2 of the Revenue and Taxation Code shall not be included prior to July 1, 1988, in the gross receipts subject to any cable television franchise fee. Any cable television franchise or license awarded by a city or county or city and county pursuant to this section may authorize the grantee thereof to place wires, conduits and appurtenances for the community antenna television system along or across such public streets, highways, alleys, public properties, or public easements of said city or county or

city and county. Public easements, as used in this section, shall include but shall not be limited to any easement created by dedication to the city or county or city and county for public utility purposes or any other purpose whatsoever.